No. 505

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

LESTER A. CRANCER and GEORGE B. FLEISCHMAN, Co-Partners, Doing Business Under the Firm Names of VALLEY STEEL PRODUCTS COMPANY and MID-VALLEY STEEL COMPANY, Respectively,

Petitioners and Appellants Below,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation,

Respondents and Appellees Below.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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Cases Cited.

Statutes Cited.

IN THE

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FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation,

Respondents and Appellees Below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action at law brought in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri by Respondents against Petitioners for the recovery of additional freight charges on shipments of commodities known as "pipe thread protectors" beyond that which Petitioners had previously paid. The trial was by court without a jury, and a judgment was

rendered in favor of the Respondents and against the Petitioners in the sum of $2,263.41. An appeal from said judgment was taken by the Petitioners to the United States Circuit Court of Appeals for the Eighth Circuit, which confirmed the judgment of the District Court.

The Petitioners claimed in the trial before the Judge of the District Court that they had paid the full freight charges on the commodities shipped, while the Respondents claimed that they were entitled to additional freight charges. The grounds upon which the Petitioners sought a reversal in the Circuit Court of Appeals (R. 342), so far as it may be material here, were:

(1) That the District Court erred in rendering judgment in favor of the Respondents and against the Petitioners for such additional freight charges, in that said judgment was based upon the use to which the articles were put by the Petitioners after they had received them from the respondent railroad carriers.

(2) That the District Court improperly admitted in evidence an opinion of the Interstate Commerce Commission on the theory that said opinion was evidence of what the correct tariff rate should be on the commodity in question, in the suit at bar.

(3) That the District Court should not have proceeded with the trial of this cause while there was a complaint and proceeding pending before the Interstate Commerce Commission, in which the very rates sought to be collected by Respondents in the instant suit were attacked as being unreasonable and discriminatory.

The commodities shipped in the cars mentioned in the suit of Respondents were described as "scrap pipe thread protectors," and the Petitioners had previously paid the so-called scrap iron rate on these commodities. Respond-

ents sought in their petition filed in the District Court to recover from Petitioners the same rate on these discarded thread protectors as was charged by the railroad Respondents for the shipment of new thread protectors.

A description of the method by which the thread protectors were gathered from scrap iron dealers and scrap yards and the method by which they were remanufactured by the Petitioners in their plant at Cairo, Illinois, is found in the Record, pages 199 to 210. Forty per cent of the thread protectors which were shipped from the oil fields and the scrap yards to the Petitioners had to be thrown out altogether, as they were not even fit for remanufacture (R. 237).

As the Record discloses (R. 199-210), it was necessary to remanufacture every single one of these thread protectors before they could be resold by the Petitioners. The record is full of testimony as to the use to which the Petitioners put the articles shipped, and this testimony was all objected to by the Petitioners (R. 44, 91, 127, 218, 219, 220, 247, 248).

The District Court must have based its judgment upon the theory that the commodities shipped in the cars in question were not scrap, because they were not **used** as scrap for remelting purposes only. This is clearly disclosed by the statement of the District Court at the conclusion of the case and the oral argument (R. 292):

> "The Court: There is no doubt in my mind at all in this matter. I do not think this is scrap iron. I do not believe that they are entitled to that rate and the course of dealing, over a long period of time, shows that, as a matter of fact, it never was **used** in that way."

After making this statement the Court advised the plaintiffs to submit findings of fact and conclusions of law,

and immediately rendered its judgment in favor of the plaintiffs.

Again, Petitioners objected to the introduction of an opinion of the Interstate Commerce Commission in the case of Crancer et al. v. Abilene & Southern Railway, 223 I. C. C. 375, decided August 6, 1937 (R. 190-195). Petitioners objected in the lower court to the introduction of this opinion for the reason that it had no probative value and that it was not determinative of the issues in the case at bar, and that it was not even persuasive, and that it was not res judicata of the issues before the District Court. This point was vigorously argued in the Court of Appeals, but the appellate court sustained the ruling of the District Court in admitting this opinion in evidence.

The opinion was admitted in evidence upon the theory that the decision was evidence of what the correct tariff rate should be for the articles shipped by the Petitioners.

Finally, Petitioners took every step possible to prevent the trial of the case in the District Court, for the reason that there was pending before the Interstate Commerce Commission a proceeding in which the very rates sought to be collected by the Respondents in their suit in the District Court were attacked as being unreasonable and discriminatory. This proceeding was called to the attention of the District Court by the defendants' motion to stay proceedings and plea to the jurisdiction and plea in abatement (R. 14), to which there was attached a copy of the complaint then pending before the Commission (R. 217-224).

On December 22, 1939, the case was continued by the District Court, on application of the Petitioners, to the March Term, 1940, for the reason of the pendency of the complaint and proceedings before the Commission, but

Respondents filed a motion to set aside this continuance (R. 13), asserting that the Petitioners were delaying the matter before the Commission and indefinitely postponing the same. Without proof of such assertion of such delay, the District Court set aside the continuance and set the case for trial and overruled the Petitioners' motion to stay proceedings (R. 24).

Petitioners, at the time of the trial before the District Court, again raised the question of that Court's right to try this case in view of the pendency of the complaint and proceedings before the Interstate Commerce Commission to determine the reasonableness of the rates involved (R. 32, 33, 34).

Petitioners also offered in evidence a copy of the complaint before the Commission, which was cause No. 28,215 (R. 17), and offered proof to show that the hearing before the Commission had been set in Cairo, Illinois, for February 29, 1940 (R. 24), thus completely negativing the assertion by Respondents that the Petitioners were delaying the matter before the Commission and indefinitely postponing the same.

Petitioners also pointed out to the District Court that in a companion case pending before another Judge of the same District Court, to wit, Judge Charles B. Davis, the same motion to stay proceedings had been had, and although Judge Davis had not sustained the motion, he had filed a memorandum in which he stated, "In view, however, of the matters set forth by the defendants, we are of the opinion that if the Interstate Commerce Commission is willing to reopen the investigation of the rates in controversy, the trial of this matter should be postponed" (R. 33).

The said offer in evidence and offer of proof was excluded by the trial judge (R. 34-35). However, Exhibit

"G" was permitted in evidence (R. 278-280), which clearly showed that the matter was set for hearing on February 29, 1940, at Cairo, Illinois, before an examiner of the Interstate Commerce Commission by virtue of an order of that Commission, dated February 20, 1940.

The trial of the instant cause by the District Court was held from January 31, 1940, to February 7, 1940, despite the pendency of the complaint before the Commission. Under these circumstances, it is Petitioners' contention that the District Court had no right to proceed with the trial of the cause, and proceedings should have been stayed until the Commission had passed upon the reasonableness of the rates sued upon by the Respondents. As a matter of fact, the Interstate Commerce Commission, by its decision of February 18, 1941, through Division 3 thereof, 243 I. C. C. 509, Advance Sheet, decided that the rates which formed the basis of the District Court's judgment were unreasonable. This decision of the Commission is printed in Appendix A attached hereto and made a part hereof, to which reference is specifically made. The Circuit Court of Appeals, in its opinion (R. 348-349) overruled this contention of the Petitioners.

II.

STATEMENT OF JURISDICTION.

The date of the opinion of the United States Circuit Court of Appeals of the Eighth Circuit is June 30, 1941.

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347, Title 28, United States Code Annotated, which provides:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any

party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

III.

QUESTIONS PRESENTED.

The questions presented are set forth in Summary Statement of the Matter Involved under I hereinabove.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The reasons relied on for the allowance of this writ are that the Circuit Court of Appeals, by its opinion (R. 341) has decided a federal question in a way in conflict with applicable decisions of this Court, which are fully and completely set forth in our brief. Said decisions are as follows:

Interstate Commerce Commission v. Delaware, Lackawanna & Western Railway, 220 U. S. 235, 31 S. Ct. 392;

Interstate Commerce Commission v. B. & O. Railroad Co., 225 U. S. 326, 32 S. Ct. 742;

Great Northern Railway Co. v. Merchants et al., 259 U. S. 285, 42 S. Ct. 477;

Texas Pacific Railway Co. v. American Tie & Timber Co., 234 U. S. 138, 34 S. Ct. 885;

Robinson v. B. & O. Railroad Co., 222 U. S. 506, 32 S. Ct. 114;

General American Tank Corp. v. El Dorado Terminal Co., 308 U. S. 422, 60 S. Ct. 325.

Wherefore, your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11,859, Lester A. Crancer and George B. Fleischman, Co-partners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively, Appellants, v. Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated August 1, 1941.

LESTER A. CRANCER and GEORGE B. FLEISCHMAN, co-partners doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company, respectively,
Petitioners.

IRL B. ROSENBLUM,
BERNARD MELLITZ,
CLYDE W. WAGNER,
ABRAHAM B. FREY,
Counsel for Petitioners.

BRIEF AND ARGUMENT.

The jurisdiction of this Supreme Court of the United States is invoked on the grounds that the opinion of the Eighth Circuit Court of Appeals decided a federal question in a way which is in conflict with the applicable decisions of this Court hereinafter set forth. The statement of this case has been set forth in full in the preceding petition for writ of certiorari under I, entitled "Summary Statement of the Matter Involved."

SPECIFICATION OF ERRORS.

I. That the Circuit Court of Appeals erred in sustaining the judgment of the District Court in favor of the Respondents and against the Petitioners for additional freight charges in that said judgment was based upon the use to which the articles were put by the Petitioners after they had received them from the respondent railroad carriers.

II. That the Circuit Court of Appeals erred in sustaining the District Court, which improperly admitted in evidence an opinion of the Interstate Commerce Commission on the theory that said opinion was evidence of what the correct tariff rate should be on the commodity in question in the suit at bar.

III. That the District Court should not have proceeded with the trial of this cause while there was a complaint and proceeding pending before the Interstate Commerce Commission, in which the very rates sought to be collected by Respondents in the instant suit were attacked as being unreasonable and discriminatory.

ARGUMENT.

I.

The first assignment of error is based upon the fact that the District Court in its judgment in favor of Respondents and against Petitioners based said judgment for additional freight charges upon the use to which the articles were put by Petitioners after they had received them from the Respondent railroad company. This is evident from the testimony admitted over the objection of Petitioners (R. 91, 127, 220, 247, 248, 292). The District Court, as pointed out in our summary statement in the beginning of this petition for writ of certiorari, clearly indicated that the theory upon which he rendered judgment was that the use to which Petitioners put the commodities shipped was a controlling factor in his mind. We cite again this statement by the Court, "There is no doubt in my mind at all in this matter. I do not think this is scrap iron. I do not believe that they are entitled to that rate and the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way" (R. 292).

It was clearly pointed out that when the scrap thread protectors were discarded and used only as scrap and shipped to a mill to be remelted, they bore the scrap iron rate (R. 247-248). On the other hand, when these thread protectors were shipped to the Petitioners' plant and remanufactured by them, the decision of the District Court held that they should bear a different and higher rate, the same as if the articles were brand new. Such practice is definitely forbidden by Section 2, Title 49, United States Code Annotated. That section expressly prohibits discrimination between shippers based on the use to which the article is put when it is received by the shipper.

Every single authority on this subject establishes the rule with uniform weight.

In the case of Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad, 220 U. S. 235, 31 S. Ct. 392, the Interstate Commerce Commission declared that the railroads could not refuse carload rates to forwarding agents who had combined many shipments into carload lots. Mr. Chief Justice White, in asserting that the order of the Commission was correct, said:

> "The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of his duty to carry, or, what is equivalent, **may discriminate in fixing the charge for carriage**, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement * * *" * * * "It is not open to question that the provisions of Section 2 of the Act to regulate commerce were substantially taken from Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the 'equality clause' * * * Certain also it is that, at the time of the Act to Regulate Commerce, that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated * * * And it may not be doubted that the settled meaning which was affixed to the English equality clause at the time of the adoption of the Act to Regulate Commerce applies in construing the second section of that act."

The most emphatic and pertinent case before the Commission with reference to the matters here discussed is that of Wrought Washer Manufacturing Company v. Pere Marquette Railway Co., 136 I. C. C. 703. In that proceeding there was involved the question of the lawfulness of the rates, as stated at page 704 of the report, on "pieces of iron or steel constituting the waste, crop ends, or trimmings accumulated at steel mills as an incident to the manufacture of prime sheets, plates, strips and similar products. In other instances, the shipments received by complainant consisted of material obtained by dismantling boilers, floor plates, etc. Complainant, after reheating and rerolling some of these pieces and shearing or sorting others, utilized them by stamping therefrom iron or steel washers." The Commission, in discussing this situation, said:

> "Aside from this contention, however, complainant urges that it is the practice of defendants, in interpreting this definition and in determining whether they will apply the scrap iron rates on a particular shipment, to inquire into the character, business and equipment of the consignee; so, that if the consignee happens to be a **steel mill** equipped to **remelt** the material the scrap iron rate is applied, but if the consignee has no remelting facilities and puts the material to some other use which does not entail remelting the scrap iron rate is not applied even though the material is identical in kind. The evidence introduced by complainant strongly supports its contention in this respect and is not controverted by defendants. **Such a method of determining the rates to be applied is clearly indefensible.** There can be but one applicable rate on like shipments betwen like points . . . .
>
> "Apparently defendants' position is that no single general definition or description can be devised to cover all of the kinds of iron and steel received by complainant, and that since scrap iron, as defined in the

tariffs, is generally accorded the same rates as billets, any finding which would accord reasonable rates on shipments of the character under consideration would virtually eliminate from the definition of scrap iron the phrase 'having value for remelting purposes only.'

"We have previously adverted to the unlawful manner in which apparently this definition is being applied by defendants and the **necessity for a revision** thereof in order to more accurately describe the traffic intended to be covered. The fact that such a revision may be attended with difficulty is no justification for denying to complainant reasonable rates." (Emphasis ours.)

In the case of Zimmerman, Wells et al. v. Director General, 122 I. C. C. 199, the Commission set forth its ruling in the following language:

"We have consistently found that rates **shall not be based upon the use** which is to be made of a commodity. In considering a somewhat analogous tariff item it was held that old rails shown under the heading 'scrap iron and scrap steel, including' were entitled to the rate in that item **even though the rails were to be used further.** Midcontinent Equipment & Machinery v. M. Railway Co., 88 I. C. C. 217."

A decision which is most appropriate to the issues involved and which we feel decides the issue here is that of Interstate Commerce Commission v. B. & O., 225 U. S. 326, 32 S. Ct. 742. The facts in that case may be simply stated. The railroad charged themselves lower rates for coal intended for railway consumption than they charged other shippers for coal intended for their own ordinary commercial consumption. The opinion of Mr. Justice McKenna, with careful and logical reasoning, holds that section 2 of the Act directly and explicitly prohibits the application of tariff rates based upon the **use** to which the commodities are later put. The Court, in arriving at

its conclusion, considered whether there were differences in the traffic of fuel coal which distinguished it from traffic in commercial coal and which, as contended by the railroad company, made it traffic dissimilar in circumstances and conditions, or whether the opposite was true. It held that the railroads would be compelled to pay the same rate as other users of coal. The Court asks the question: "Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal?" and answers this question as follows:

> "Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to the other with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges."

Now, if it is improper and illegal for a carrier to charge a different rate if coal is shipped to it from the rate which it charges on coal to commercial users, then certainly it must be admitted that it is equally improper and unlawful for the carrier to charge one rate to the defendants because they salvage some of the material and another rate to the remelting mill which remelts the material. For, in its essence, does not the material which was remelted go to produce another article in much the same fashion that the process of salvage operation used by the defendants produces an article different from the article when it was received by the defendants in its scrap form?

Since the judgment of the Court was so clearly based upon the use to which the articles shipped were put after

they were received and remanufactured by the defendants, the judgment is erroneous under the authorities and ought to be reversed.

II.

The decision of the Circuit Court of Appeals was further erroneous in that it sustained the trial court in permitting a decision of the Interstate Commerce Commission to be introduced in evidence, to wit, Crancer et al. v. Abilene & Southern Railway, 223 I. C. C. 375 (R. 190).

Petitioners objected to the introduction of this Interstate Commerce Commission opinion for the reason that it had no probative value and was not determinative of the issues of the case at bar. The opinion of the Interstate Commerce Commission very clearly related to cars of thread protectors other than those which were in issue in the trial at bar, and there was never any showing in any place in the record that the cars considered by the Commission in 223 I. C. C. 375 contained articles of the same nature, character and description, as were contained in the cars mentioned in the suit at bar. Upon being pressed by attorneys for the Petitioners to state the theory upon which the decision was offered (R. 195) counsel for the Respondents stated it as follows: "It is evidence of what the correct tariff rate is." The District Court overruled Petitioners' objection and permitted the opinion to stand as evidence of the correct tariff rate for the commodities mentioned in the suit at bar.

Obviously the District Court would have been bound to have been influenced by this decision of the Interstate Commerce Commission, and must have believed that the decision constituted a binding precedent as to the contents and freight rates applicable thereto of the cars in question in the suit at bar.

The case of Sonken-Galamba Corp. v. Atchison, 28 Fed. Sup. 456, discusses the question of res judicata as it may apply to similar articles which are the subject of different lawsuits. In the Sonken-Galamba case Judge Otis was asked to render a summary judgment by the plaintiff, who was suing railroad companies for failure of the carriers to transport at the scrap iron rate what the plaintiffs claimed was scrap iron.

The plaintiffs, in their motion for summary judgment, pointed out that in previous lawsuits in the nature of mandamus proceedings, the material involved had been adjudged to be carried at the scrap iron rate. Judge Otis, however, ruled that the claim for damages brought by the plaintiffs in this case arose from the failure of railroad companies to move other material under the scrap iron rate. The Judge denied the motion for a summary judgment on the theory that the findings of the other courts in a mandamus proceeding was not res judicata in the damage suit pending before him.

He pointed out that the only material issue of fact involved in the mandamus suit was whether what was tendered for shipment were pieces of iron and steel of value only for remelting purposes. The opinion makes clear that the doctrine of res judicata can only apply where the identical thing is in issue between the identical parties.

Judge Otis discussed the issue as follows:

> "There have been hundreds, perhaps thousands, of cases involving freight undercharges and overcharges. Each one of these cases concerned what rate a particular shipment should pay, involved a determination as to what the commodity shipped was. So far as our research has revealed, it has never been so much as contended that a judgment in one of these cases was res adjudicata in a subsequent case between the same parties involving a shipment of an allegedly similar

commodity. We must conclude that the opinion of the bar has been against plaintiffs' theory."

Thus we see that in the case at bar the opinion of the Interstate Commerce Commission (R. 190) should never have been admitted in evidence, had no probative value, and might have influenced the Court to have given a judgment based on the theory of counsel for respondents that the former opinion of the commission established what the correct tariff rate should be on the articles involved in this suit.

III.

It is finally urgently contended that the District Court had no right to proceed with the trial of this case when the very rates which the Respondents were attempting to collect were claimed in a proceeding pending before the Interstate Commerce Commission to be unjust and unreasonable.

On March 10, 1939, Petitioners filed with the Interstate Commerce Commission a complaint (R. 17-24), to which the Respondents were parties, charging that the rates which the Respondents were seeking to collect in the suit before the District Court were unreasonable and unjust. This complaint before the Commission antedated the suit at bar, which was filed on March 16, 1939 (R. 10 and 11). By every means available to Petitioners, including an unsuccessful effort to obtain a writ of prohibition out of the Circuit Court of Appeals for the Eighth Circuit, Petitioners sought to have the District Court stay its proceedings until the reasonableness of the rates sought to be collected could be determined by the Commission.

Every decision of which we have any knowledge holds that it is mandatory upon the District Court not to proceed with the trial of a case when the reasonableness of the

rates involved are a matter pending before the Interstate Commerce Commission. The reason for this rule is made obvious in the case at bar, because it would naturally be a waste of time for the District Court to try a case and decide that the defendants would have to pay a rate which the Commission later determined was an unreasonable rate, and, therefore, could not be collected by the railroads.

As a matter of fact, in the case at bar the very situation occurred which must have been in the minds of the writers of all the opinions, which we are about to set forth. The Commission decided that the rates sought to be collected by the railroad plaintiffs in the case at bar are unreasonable, as indicated in their decision, which is appended hereto as Appendix A.

Respondents gave the District Judge, as a reason for their great hurry in this case, the fact that Petitioners were delaying the hearing before the Commission. This was not true; and, further, Petitioners offered to prove (R. 24) that the matter was set for hearing before the Interstate Commerce Commission just a few weeks later than the date of this cause in the District Court. Petitioners do not understand the reason for the terrific pressure and haste to get this case at trial. There are other cases pending of a like nature in other divisions of the District Court of Missouri in St. Louis, and every single one of these other cases has been held in abeyance subject to the outcome of the proceeding before the Commission.

Our statement quoted Judge Charles B. Davis' memorandum (R. 33) in which he very clearly said that the trial of the similar case before him should be postponed. We think that that situation should have resulted in the case at bar as a matter of comity between the Courts of this country and the Interstate Commerce Commission. On this issue the authority of the Supreme Court of the United

States is uniform. The first opinion on this subject is that of Justice Brandeis in Great Northern Railway Co. v. Merchants et al., 259 U. S. 285, 42 S. Ct. 477. The learned Justice there declares the rule to be:

> "(2, 3) Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformly can be secured only if its determination is left to the Commission. However, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts * * *"

Of like effect is Texas & Pacific Railway Co. v. American Tie & Timber Co., 234 U. S. 138, 34 S. Ct. 885, and Robinson v. B. & O. Railroad Co., 222 U. S. 506, 32 S. Ct. 114.

The last decision concerning this vital matter is to be found in the case of General American Tank Corp. v. El Dorado Terminal Co., 208 U. S. 422, 60 S. Ct. 325. Justice Roberts here held that a District Court had jurisdiction of the subject matter of the action, but should not have pro-

ceeded to adjudicate it until the Interstate Commerce Commission had passed upon the reasonableness and legality of the practices of the parties, and the Court says:

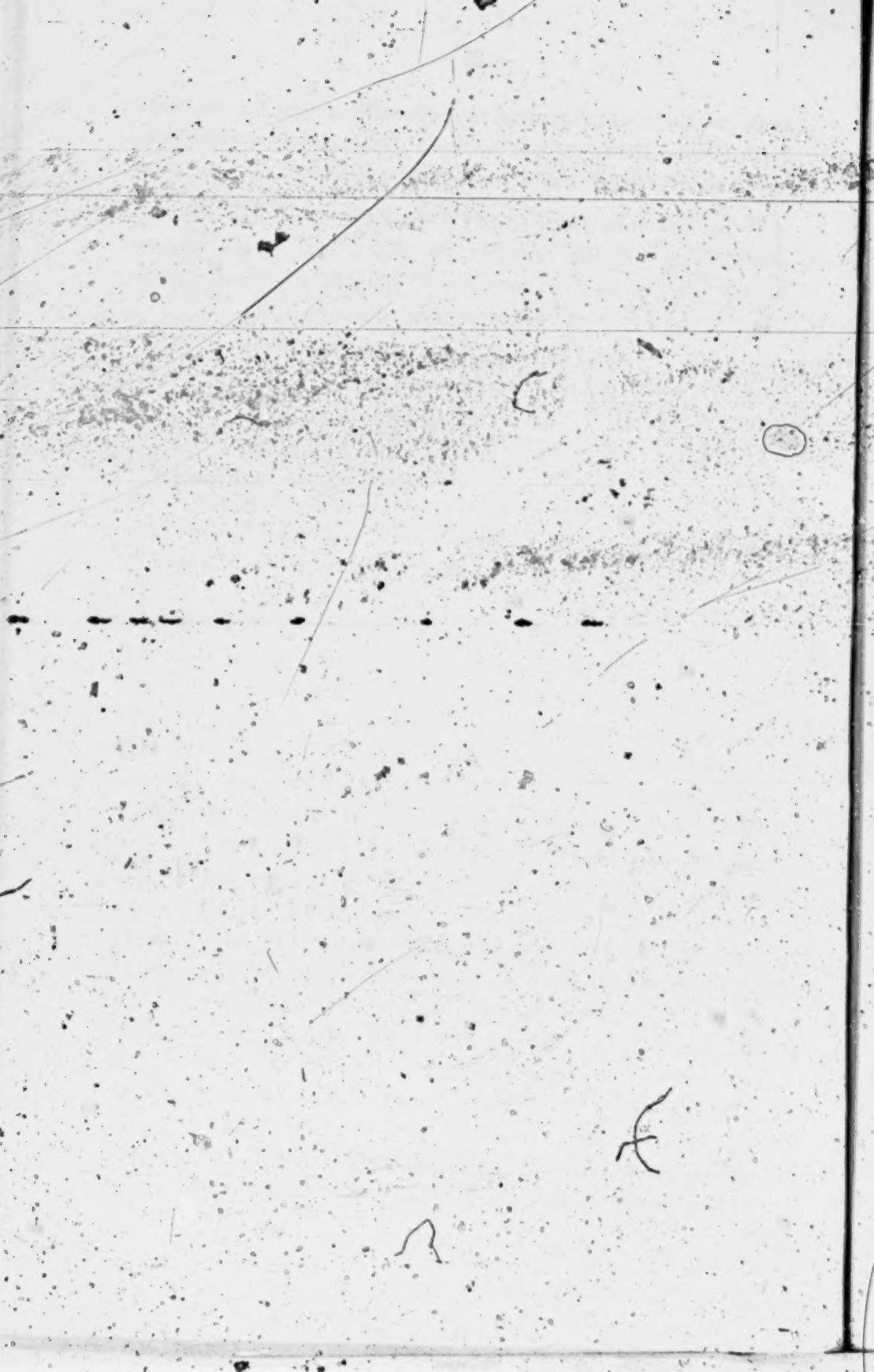
> "When it appeared in the course of the litigation that an administrative problem committed to the Commission was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal but as in Mitchell Coal & Coke Co. v. Pennsylvania Railroad Company, supra, the cause should be held pending the conclusion of an appropriate administrative proceeding."

The opinion of the Circuit Court of Appeals attempts to answer Petitioners' contentions by stating that the reasonableness of the rates was not an issue in the case at bar. That, of course, is correct, but such a statement merely begs the question herein involved. The reasonableness of the rates was an issue in the complaint pending before the Interstate Commerce Commission. That complaint had been filed before the instant suit at bar had been filed in the District Court, and the point here urgently made is that the District Court, in the light of the decisions above quoted, had no right to proceed with the trial of the cause until the Commission had determined whether or not the rates sued upon were reasonable. It is interesting in this connection to note the final paragraph of the opinion of the Circuit Court of Appeals, which is as follows: "No error appearing, the judgment is affirmed without prejudice to such rights as Appellants may have or become entitled to for reparation." The Court in this last paragraph recognizes that if the Commission's final decision declares the rate to be unreasonable, that the judgment of the District Court in effect might be set aside because it would be excessive. This gives added emphasis, if such be necessary, to the contention that the orderly administration of justice

requires the federal courts to wait with a suit for the collection until those rates have been determined by the Commission to be reasonable or otherwise.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

IRL B. ROSENBLUM,
BERNARD MELLITZ,
CLYDE W. WAGNER,
ABRAHAM B. FREY,
Counsel for Petitioners.



APPENDIX A.

INTERSTATE COMMERCE COMMISSION

No. 28215

VALLEY STEEL PRODUCTS COMPANY, ET AL.,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.

243 I. C. 509 (Advance Sheet).

Submitted December , 1940. Decided February 18, 1941.

Rates on used pipe-thread protecting rings, in carloads, from points in Louisiana, Texas, Arkansas, California, Montana, New Mexico, Wyoming, and the Province of Alberta, Canada, to St. Louis, Mo., and East St. Louis and Cairo, Ill., found unreasonable. Reasonable rates for the future prescribed and reparation awarded.

Nuel D. Belnap, Robert M. Burchmore, and John S. Burchmore for complainants.

L. P. Day, A. B. Enoch, E. A. Smith, M. G. Roberts, J. I. Bonner, Norman E. White, Robert Thompson, H. H. Larimore, George W. Holmes, and Toll R. Ware for defendants.

Charles Donley for intervener.

REPORT OF THE COMMISSION.

Division 3, Commissioners Mahaffie, Alldredge, and Johnson by Division 3:

Exceptions to the report proposed by the examiner were filed by complainants and defendants, and the issues were

argued orally. Our conclusions differ somewhat from those recommended by the examiner.

Complainants are Lester A. Crancer and George B. Fleischman, copartners, doing business under the firm names of Valley Steel Products Company and Mid-Valley Steel Company. By complaint filed March 10, 1939, as amended, they allege that the rates on used and discarded thread protectors from points in Louisiana, Texas, Arkansas, California, Montana, New Mexico, Wyoming, Michigan, and the Province of Alberta, Canada, to St. Louis, Mo., and East St. Louis and Cairo, Ill., were and are unreasonable, unjustly discriminatory, unduly prejudicial, and in violation of section 6 of the Interstate Commerce Act. We are asked to prescribe lawful rates for the future and to award reparation. The Pittsburgh Screw & Bolt Corporation intervened. Rates will be stated in amounts per 100 pounds, and do not include any authorized emergency charges.

Thread protectors are metal rings which are applied to pipe by the manufacturer solely for the purpose of protecting threads on gas and oil well pipe during transportation. They are removed before the pipe is placed in use. Due to the fact that they were thought to have no value, originally they were allowed to lie exposed to the weather for considerable periods, or were buried to prevent injury to cattle. However, in recent years their value has been recognized and they have been handled with more care and are in better condition. Used thread protectors are purchased from oil well companies or scrap dealers located at or near oil and gas fields. They are shipped loose in open-top cars to St. Louis, East St. Louis, or Cairo, where they are sorted for the purpose of determining which ones are fit for reconditioning so that they may be used again for their original purpose. A large percentage of those re-

ceived by complainants are fit to be reconditioned. The remainder are discarded as scrap fit for remelting only. Special tools and machines have been devised for reconditioning used thread protectors.

After the thread protectors have been sorted, those that can be used are immersed in a series of tanks containing acid and hot water rinses for the purpose of removing rust, dirt, grime, and heavy scale. The next operation in the reconditioning process, and stated to be perhaps the most important one, is to make the protectors absolutely round, since many are bent out of line. This is done by placing the protector rings over plugs and inserting them in a 300-ton press. After the rings are made concentric, a special tool is used in a lathe to straighten or reform the threads, provided there is sufficient metal for that purpose. If there is not sufficient metal, or for any other reason it cannot be rethreaded, the protector is then discarded as scrap. The final process consists of screwing the reconditioned protector on a piece of pipe to determine whether it is of exact size. If the size is too far from the exact, the protector will be discarded at that point in the operation.

Prior to 1939, the value of used protectors averaged $30 per ton at origin. There are two types, one of which has 10 V-shaped threads to the inch. It was replaced early in 1939 by a new type having 8 U-shaped threads to the inch and which is now standard. In 1939, prices ranged from $10 per ton for the old type to $85 for the new. The average for the old type was $25. Reconditioned new-type protectors sell for $135 to $140 per ton, and original new-type protectors for approximately $200 per ton.

During the period July 20, 1936, to November 25, 1939, complainants received 244 carloads of used thread protectors, of which 161 moved from various points in Texas, 33 from Louisiana, 2 from El Dorado, Ark., 20 from

Hobbs, N. Mex., 18 from California, 2 from Gladwin, Mich., 1 from Manville, Wyo., 4 from Montana, and 3 from Canada. Of 237 carloads shown of record, 6 were loaded under 40,000 pounds, 32 from 40,000 to 50,000 pounds, 56 from 50,000 to 60,000 pounds, 54 from 60,000 to 70,000 pounds, 37 from 70,000 to 80,000 pounds, and 52 cars in excess of 80,000 pounds. Some of the latter weighed more than 100,000 pounds. The average weight of the 237 cars was 66,335 pounds.

Under the general heading "Pipe Fittings" rings, iron or steel, for protecting threaded ends of iron or steel pipe, in packages, in carloads, were and are rated fifth class, minimum 36,000 pounds, in western and official territories. On July 10, 1939, the classification was amended by the addition of a note to this item providing that old used thread protecting rings having value only for reconditioning will be accepted loose in carloads. Prior to April 9, 1937, fifth-class rates under the southwestern revision were 40 per cent of the first class rates. On that date fifth class was made 37.5 per cent of first in the Southwest. In many instances commodity rates applied and apply on pipe fittings, in carloads, minimum 46,000 pounds, subject to certain packing requirements. When those requirements were not observed a 10 per cent penalty charge was made.

From origins in Arkansas and Louisiana fifth-class rates apply on thread protectors. Commodity rates are provided generally from points in Texas. Those under consideration range from 23.5 to 36.5 per cent of the corresponding first-class rates. On the shipments from New Mexico, all of which moved from Hobbs, combination rates applied, which were 39.5 per cent of the first-class rate prior to April 9, 1937, and 37.5 per cent after that date. From the California origins commodity rates, approximating 19.3 per cent of first class, apply. On the shipments

from Wyoming and Canada the rates are based on 32.5 per cent of first class, the iron and steel articles basis. From Montana commodity rates, equivalent to 25.7 per cent of first class, apply. Fifth-class rates apply from Michigan.

Complainants contend, however, the the tariffs are so worded that it is difficult to determine just what rates are applicable on thread protectors and in support of that contention they state that various carriers apply different rates to the same commodity under the tariffs. This alleged ambiguous tariff situation is the basis for the allegation of a violation of section 6 of the act, which requires the publication of tariffs which plainly state the rates to be applied for the transportation of property.

On a large number of the shipments under consideration the charges collected were based upon the scrap-iron rates from and to the same points. In another proceeding, Crancer and Fleischman v. Abilene & S. Ry. Co., 223 I. C. C. 375, complainants herein assailed as inapplicable and unreasonable rates sought to be collected on thread-protecting rings, in carloads, from points in the Southwest to St. Louis and East St. Louis. Charges on some of the shipments had been collected on the scrap-iron basis and on others at rates not shown of record. Complainants' principal contention there was that the commodity shipped was scrap iron and that the application of any rates higher than the scrap-iron rates was illegal. Division 3 found that the scrap-iron rates collected were inapplicable; that the applicable rates were the class or commodity rates on pipe fittings, plus 10 per cent thereof when loaded loose at random, and that the applicable rates had not been shown to be unreasonable. Thereafter the carriers filed suits in court to enforce collection of the outstanding undercharges. Those shipments are included in the claims herein.

While complainants admit for the purpose of this proceeding that the rates on scrap iron are not applicable, they contend that reasonable rates on thread protectors should bear some definite relation to the scrap iron rates. The rates on scrap iron within the Southwest are based on alternative distance scales of 15 per cent of first class, minimum 50,000 pounds, and 12.5 per cent of first class, minimum 75,000 pounds.

Complainants propose rates on used thread protectors based upon alternative minimum weights of 40,000, 60,0000, and 80,000 pounds. The proposed rates on the 80,000-pound minimum are the same as those on scrap iron for 50,000 pounds. On the 60,000-pound minimum the proposed rates average about 6 cents, and on the 40,000-pound minimum about 12 cents, higher than those proposed for 80,000 pounds. The rates proposed in connection with minima of 40,000 and 60,000 pounds bear no definite relation to the scrap iron rates, but, generally speaking, from points in Louisiana to Cairo they are about 9 cents higher than the rates on scrap iron on the 50,000 and 75,000-pound basis, respectively. As an example, the rates on scrap iron from Rodessa, La., to Cairo are 29 cents, minimum 50,000 pounds, and 24 cents, minimum 75,000 pounds. The proposed rates on used thread protectors are 29 cents, minimum 80,000 pounds, 33 cents, 60,000 pounds, and 38 cents, 40,000 pounds. The present rate is 59 cents.

From Odessa, Tex., to Cairo, 1,215 miles over the route of movement, the present rate is 86 cents, which yields on the minimum of 46,000 pounds earnings of 32.5 cents per car-mile. The scrap-iron rates from and to the same points are 43 cents, minimum 50,000 pounds, and 36 cents, minimum 75,000 pounds. Based on the same distance those rates and minima yield car-mile earnings of 17.7 and 22

cents, respectively. The average value of heavy melting steel at Chicago, Ill., in 1939 was $14.90 per ton.

Complainants also compare the value of and the rates and earnings on many other commodities shipped for similar distances in the same general territory. These commodities include, among others, various kinds of seed and clay, clay products, returned empty containers for beverages, lignon liquor, pumicite drain tile, cottonseed hulls, petroleum, and cinders. In most instances the value of thread protectors is lower than the value of the compared commodities, while the rates and car-mile earnings are higher. However, the earnings on thread protectors are based on the average weight but those on the compared commodities are based on minima.

Complainants argue that considering the nature of the commodity, upon which there are no claims for loss or damage, and the type of equipment used, any rates higher than those proposed are patently unreasonable. They rely largely upon Wrought Washer Mfg. Co. v. Pere Marquette Ry. Co., 159 I. C. C. 75, wherein division 3 found the rates on mill warmers, crop ends of iron and steel sheets, plates, skelp, strip and band iron and steel, and old and imperfect plates of dismantled boilers and floor plates, which could not be damaged by breakage or exposure to weather, loaded loose at random in open-top cars, from and to points in official territory unreasonable to the extent that they exceeded the contemporaneous rates on billets from and to the same points. That proceeding, which dealt with waste or scrap material, is not controlling in this proceeding which deals with a used article.

Defendants' testimony was directed mainly to the reasonableness of the applicable rates, that is, the rates on pipe and pipe fittings which include new, reconditioned, or old thread protecting rings having value only for recondi-

tioning. They point to the fact that the Commission in Prairie Pipe Line Co. v. Arkansas W. Ry. Co., 146 I. C. C. 149, found among other things that the rate on new and secondhand iron or steel pipe between points in the Southwest were unreasonable to the extent that they exceeded 32.5 per cent of first class. The Commission also prescribed that basis on pipe and pipe fittings within western trunk-line territory and from points in official territory to points in western trunk-line territory and on pipe and related articles to, from, and within the Southwest.

With respect to the packing requirements, such rules and regulations as are provided in the governing classifications apply in connection with class and commodity rates, except where the commodity tariffs provide their own packing rules. It is defendants' position that as long as the packing requirements and penalty provisions with respect to thread protectors remain in the tariffs, it is their legal duty to enforce them. On exceptions they state that if we believe that the packing requirements and penalty provisions are unreasonable, we should so find and apply that finding to new protectors as well as the old ones. The propriety of packing provisions for new thread protectors is not in issue and the record affords no basis for a determination of that question. However, in view of the manner of transporting used protectors and the fact that they are not susceptible to damage, we are of the opinion that it is unreasonable to require that they be packed for shipment.

The evidence is clear that used thread protecting rings have a relatively low value, as compared with new protecting rings, until after they are reconditioned. In fact, a large percentage of used rings are ultimately sold as scrap. None of them can be used for their original purpose until after the reconditioning process. They are, how-

ever, susceptible of definite identification and a separate description in the tariffs. It seems equally clear, therefore, that they cannot be described properly as scrap. We are here concerned with the problem of determining a just and reasonable basis of rates on used thread protecting rings, having value only for reconditioning, that will afford an equitable distribution of transportation costs. Such a basis properly should be lower than that maintained on the new article. The present record indicates that 25 per cent of first class would be reasonable maximum basis for application on this traffic.

We find that the applicable rates on used thread protecting rings, having value only for reconditioning, from and to the points covered by the complaint, as amended, were unreasonable to the extent that they exceeded rates made 25 per cent of the coresponding contemporaneous first-class rates, and that they are and for the future will be unreasonable to the extent that they exceed or may exceed rates made 25 per cent of the corresponding present first-class rates, minimum 60,000 pounds.

We further find that complainants received shipments as described and paid and bore the charges thereon; that they have been damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found reasonable for the past; and that they are entitled to reparation, with interest. Complainant should comply with rule V of the Rules of Practice. Defendants will be authorized to waive collection of outstanding undercharges to the basis of rates found reasonable herein.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 18th day of February, A. D. 1941.

No. 28215

Valley Steel Products Company, Mid-Valley Steel Company and Lester A. Crancer and George B. Fleischman

v.

Abilene & Southern Railway Company; Alton and Southern Railroad; The Alton Railroad Company; The Arkansas Western Railway Company; The Atchison, Topeka and Santa Fe Railway Company; The Beaumont, Sour Lake & Western Railway Company, (Guy A. Thompson, Trustee); Chicago, Burlington & Quincy Railroad Company; Chicago and North Western Railway Company, (Charles P. Megan, Trustee); The Chicago, Rock Island and Gulf Railway Company, (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees); The Chicago, Rock Island and Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees); Cisco & Northeastern Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); The Colorado and Southern Railway Company; Eastland, Wichita Falls & Gulf Railroad Company; Fort Worth and Denver City Railway Company; Great Northern Railway Company; Gulf, Colorado and Santa Fe Railway Company; Illinois Central Railroad Company; International-Great Northern Railroad Company (Guy A. Thompson, Trustee); The Kansas City Southern Railway Company; Litchfield and Madison Railway Company; Louisiana & Arkansas Railway Company; Louisiana, Arkansas & Texas Railway Company; Manufacturers' Junction Railway Company; Manufacturers Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company (G. W. Webster and Joseph Chapman, Trustees); Missouri and Arkansas Railway Company;

Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); Mobile and Ohio Rail Road Company and C. E. Ervin and T. M. Stevens, Receivers; New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee); New Orleans and Northeastern Railroad Company; New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee); The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railway Company; Panhandle and Santa Fe Railway Company; Paris and Mt. Pleasant Railroad Co.; The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee); St. Louis, San Francisco and Texas Railway Company; St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees); St. Louis Southwestern Railway Company (Berryman Henwood, Trustee); St. Louis Southwestern Railway Company of Texas (Berryman Henwood, Trustee); Southern Pacific Company; Terminal Railroad Association of St. Louis; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; The Texas Mexican Railway Company; Texas-New Mexico Railway Company; Union Pacific Railroad Company; Wabash Railway Company and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers; Wichita Falls & Southern Railroad Company; The Wichita Valley Railway Company; and The Yazoo and Mississippi Valley Railroad Company.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they

are hereby, notified and required to cease and desist, on or before May 29, 1941, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of used iron pipe-thread protecting rings, from and to the points set forth in the next succeeding paragraph, any rates in excess of those prescribed in said paragraph.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before May 29, 1941, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of used iron pipe-thread protecting rings, having value only for reconditioning, from points on defendants' lines in Louisiana, Arkansas, Texas, New Mexico, California, Montana, Wyoming, Michigan, and Canada, in so far as the transportation takes place within the United States, to St. Louis, Mo., and East St. Louis and Cairo, Ill., rates which shall not exceed rates made on basis of 25 per cent of the corresponding first-class rates, minimum 60,000 pounds.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, authorized to waive collection of outstanding undercharges on the shipments described in the aforesaid report herein.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 3.

W. P. BARTEL,
Secretary.

(Seal)